North Plaza Sdn Bhd v United Securities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1006 OF 2008
SURIYADI, WAN ADNAN MUHAMAD AND MOHD HISHAMUDIN JJCA
18 AUGUST 2009

Civil Procedure — Costs — Security for costs — Whether there was 'reason to believe' that a wound up company would be unable to pay costs — Whether there was evidence to contrary that plaintiff was able to pay costs — Whether plaintiff's prospect of success relevant factor in deciding whether to order security for costs — Companies Act 1965 s 35(1)

Land Law — Caveats — Private caveats, removal of — Locus standi — Whether plaintiff was aggrieved person for purpose of s 327(1) of the National Land Code — National Land Code s 327(1)

United Securities Sdn Bhd, the plaintiff was the sole shareholder of City Centre Sdn Bhd ('CCSB'), the registered owner of several parcels of land in Kuala Lumpur ('the land'). When the plaintiff applied for and obtained a loan from Overseas Union Bank ('OUB'), it pledged all its shares in CCSB to OUB. CCSB was subsequently wound up and the liquidator for CCSB sold the land belonging to CCSB to the defendant. The defendant as purchaser lodged caveats on the titles of the land. Thereafter the plaintiff filed an originating summons ('OS') against the defendant wherein it applied to remove the caveats on the land on the grounds that the defendant did not have a caveatable interest in the land. Prior to the filing of the OS, a winding up petition had been presented to wind up the plaintiff but the plaintiff had appealed against the winding up order and pending the disposal of that appeal the plaintiff was granted an interim stay of the winding up order. Although the plaintiff's OS was filed while the interim stay was still in force, the plaintiff proceeded with the OS proceedings even after its appeal against the winding up order had been dismissed. The plaintiff succeeded in its OS application to have the caveats removed and hence the instant appeal by the defendant. In allowing the application for the removal of the caveats the trial judge made a finding that the plaintiff was the beneficial owner of the shares of CCSB notwithstanding the fact that the shares were pledged to OUB and registered in the name of OUB nominees and therefore an aggrieved person under s 327(1) of the National Land Code ('NLC'). The defendant

submitted that the plaintiff had no legal or equitable interest in the land and was not aggrieved by the caveats. Before the trial judge the defendant had applied for security for costs in the sum of RM150,000 pursuant to s 351(1) of the Companies Act 1965 ('the Act') on the grounds that since the plaintiff had been wound up there was a high risk that it would be unable to pay costs to the defendant but the trial judge dismissed the defendant's application. The defendant had also appealed against this decision. The plaintiff submitted that the defendant's contention that the plaintiff would not be able to pay the defendant's costs was unjustified because the land was worth at least RM158m.

Held, allowing the appeal with costs:

(1) Although the plaintiff had a beneficial interest in the shares in CCSB, the fact remained that it was not the registered owner of the land in respect of which the caveats were lodged. The registered owner was the company, CCSB. It is a principle of company law that a company is a legal entity which is independent and separate from its shareholders and thus the plaintiff having merely a beneficial interest in the shares of CCSB did not have any proprietary rights, legal or equitable, over the land. Hence the plaintiff was not an aggrieved person for the purpose of s 327(1) of the NLC and had no locus standi to make the application under s 327(1) (see para 22).

(2) As the plaintiff had been wound up by the court there was 'reason to believe' that it would be unable to pay the costs of the defendant if the latter were to succeed in its defence. Further, the defendant had not provided evidence to the contrary that it would be able to pay costs to the defendant. There was no merit in the plaintiff's submission that the land was worth more than RM158m because there was no valuation report tendered to confirm that the land was in fact worth that much. In any event the land did not belong to the plaintiff but to CCSB. The other relevant factor in deciding that security for costs ought to be ordered against the plaintiff was the plaintiff's prospect of success, which was extremely slim, if not, nil (see paras 30–31).

Per Incuriam: When the plaintiff's appeal against the winding up order was dismissed by the Court of Appeal, the winding up order against the plaintiff was confirmed and from then the plaintiff had no locus to proceed with the OS. Under s 236(2) of the Act only the liquidator may proceed with the OS in the name of the plaintiff. Further, the liquidator had no power to consent to the plaintiff's directors proceeding with the OS subject to the latter agreeing to certain conditions (see para 10–11).

[Bahasa Malaysia summary

Plaintif, United Securities Sdn Bhd, merupakan pemegang saham tunggal City Centre Sdn Bhd ('CCSB'), pemilik berdaftar beberapa bidang tanah di Kuala Lumpur ('tanah'). Apabila plaintif memohon dan mendapat pinjaman daripada Overseas Union Bank ('OUB'), ia mencagarkan kesemua sahamnya dalam CCSB kepada OUB. CCSB kemudiannya digulungkan dan likuidator untuk CCSB menjual tanah kepunyaan CCSB kepada defendan. Defendan sebagai pembeli memasukkan kaveat pada hak milik tanah. Selepas itu plaintif memfailkan saman pemula ('SP') terhadap defendan di mana ia memohon untuk memotong kaveat pada tanah tersebut atas dasar defendan tidak mempunyai kepentingan kaveat dalam tanah tersebut. Sebelum pemfailan SP, petisyen penggulungan diserahkan untuk menggulungkan plaintif tetapi plaintif merayu terhadap perintah penggulungan tersebut dan sementara menunggu keputusan rayuan, plaintif diberikan penggantungan interim perintah penggulungan. Walaupun SP plaintif difailkan sementara penggantungan interim masih berkuat kuasa, plaintif meneruskan dengan prosiding-prosiding SP meskipun rayuannya terhadap perintah penggulungan ditolak. Plaintif berjaya dalam permohonan SP untuk memotong kaveat dan oleh itu rayuan ini oleh defendan. Dalam membenarkan permohonan untuk pemotongan kaveat, hakim bicara membuat dapatan bahawa plaintif merupakan pemilik benefisial syer-syer CCSB walaupun fakta menunjukkan bahawa saham-saham tersebut dicagarkan kepada OUB dan didaftarkan di bawah nama calon OUB dan oleh itu orang yang terkilan di bawah s 327(1) Kanun Tanah Negara ('KTN'). Defendan menghujah bahawa plaintif tidak mempunyai kepentingan dari segi undang-undang atau ekuiti di tanah tersebut dan tidak terkilan dengan kaveat-kaveat tersebut. Di hadapan hakim bicara defendan memohon jaminan untuk kos berjumlah RM150,000 menurut s 351(1) Akta Syarikat 1965 ('Akta') atas dasar bahawa memandangkan plaintif telahpun digulungkan maka terdapat risiko tinggi bahawa plaintif tidak dapat membayar kos kepada defendan tetapi hakim perbicaraan menolak permohonan defendan. Defendan juga merayu terhadap keputusan ini. Plaintif menghujah bahawa hujahan defendan mengenai plaintif tidak mampu membayar kos defendan adalah tidak berjustifikasi kerana tanah tersebut bernilai lebih kurang RM158 juta.

Diputuskan, membenarkan rayuan dengan kos:

(1) Walaupun plaintif mempunyai kepentingan benefisial dalam saham-saham CCSB, fakta yang tetap ialah ia bukannya pemilik berdaftar tanah tersebut di mana kaveat-kaveat tersebut dimasukkan. Pemilik berdaftar ialah syarikat CCSB. Adalah menjadi prinsip

undang-undang syarikat bahawa syarikat ialah sebuah entiti perundangan yang bebas dan berasingan daripada pemegang-pemegang sahamnya dan oleh itu plaintif yang mempunyai kepentingan benefisial dalam saham-saham CCSB tidak mempunyai apa-apa hak dari segi keempunyaan, undang-undang atau ekuiti terhadap tanah tersebut. Oleh itu, plaintif bukanlah orang yang terkilan menurut s 327(1) dan tidak mempunyai locus standi untuk membuat permohonan di bawah s 327(1) (lihat perenggan 22).

(2) Memandangkan plaintif telahpun digulungkan oleh mahkamah maka terdapat 'reason to believe' bahawa ia tidak mampu membayar kos defendan sekiranya plaintif berjaya dalam pembelaannya. Selanjutnya, defendan tidak memberikan keterangan sebaliknya yang ia mampu membayar kos kepada defendan. Tidak terdapat merit dalam hujahan plaintif bahawa tanah tersebut bernilai lebih daripada RM158 juta kerana tiada laporan penilaian ditender untuk memastikan bahawa tanah tersebut bernilai seperti yang dihujahkan. Dalam apa-apa keadaan tanah tersebut bukan kepunyaan plaintif tetapi CCSB. Faktor relevan lainnya dalam memutuskan jaminan untuk kos perlu diperintahkan terhadap plaintif ialah prospek kejayaan plaintif adalah sangat rendah, jika tidak, tiada langsung (lihat perenggan 30–31).

Per Incuriam: Apabila rayuan plaintif terhadap perintah penggulungan ditolak oleh Mahkamah Rayuan, perintah penggulungan terhadap plaintif disahkan dan bermula daripada itu plaintif tidak mempunyai locus untuk meneruskan SP. Di bawah s 236(2) Akta hanya likuidator boleh meneruskan SP di bawah nama plaintif. Selanjutnya, likuidator tidak mempunyai kuasa untuk membenarkan prosiding pengarah-pengarah plaintif dengan SP tertakluk kepada persetujuan pengarah-pengarah plaintif dengan syarat-syarat tertentu (lihat perenggan 10–11).]

Notes

For cases on caveats generally, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2152–2156.

For cases on security for costs, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2083–2122.

Cases referred to

Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd [1985] 2 MLJ 165, HC (refd)

Drumdurno Pty Ltd v Braham (1982) 7 ACLR 131 (refd)

KD Resources Sdn Bhd v Ng Boon Jieh & Son Realty Sdn Bhd & Anor [2003] 1 CLJ 333, HC (refd)

Macaura v Northern Assurance Co Ltd [1925] AC 619, HL (refd)

Miharja Development Sdn Bhd & Ors v Tan Sri Datuk Loy Mean Heang & Ors and another application [1995] 1 MLJ 101; [1995] 1 CLJ 523, HC (not folld)

Northhampton Coal, Iron and Waggon Company v Midland Waggon Company (1878) 7 Ch D 500, CA (refd)

Skrine & Co v MBf Capital Bhd & Anor and other appeals [1998] 3 MLJ 649; [1998] 3 CLJ 432, CA (refd)

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin Raja Hussin [1997] 2 MLJ 487; [1997] 3 CLJ 854, CA (refd)

Legislation referred to

Companies Act 1965 ss 4(1), 236, 236(1)(e), (2)(a), 351(1)
National Land Code s 327, 327(1)

Appeal from: Originating Summons No S1–24–678 of 2008 (High Court, Kuala Lumpur)

Wong Kian Keong (Alex Tan and Yeap Poay Nee with him) (Wong Kian Kheong) for the appellant.
M Rajenthirakumar (Kumar Associates) for the respondent.

Mohd Hishamudin JCA:

[1] This is an appeal from the decision of the learned judge of the High Court Kuala Lumpur (Civil Division) who, on 20 August 2008, vide two separate orders in an originating summons action before him for the removal of caveats pursuant to s 327 of the National Land Code ('the NLC'):

(a) had allowed the plaintiff's (now the respondent before us) application to remove the caveats; and

(b) had dismissed the defendant's (now the appellant before us) application (via encl 7 in the said originating summons, but heard together with the originating summons) for security for costs.

[2] We have allowed the appeal with costs. We now give the grounds of our decision.

[3] The material facts are not disputed. A company called City Centre Sdn Bhd ('CCSB') is the registered owner of several parcels of land in the district of Kuala Lumpur.

[4] The respondent/plaintiff was at one time the sole shareholder of CCSB. It owned 100% of the shares in CCSB. The respondent applied for and obtained a loan from a bank known as Overseas Union Bank ('OUB'). As a

security for the loan, the plaintiff pledged all its shares in CCSB to OUB. The shares, having been pledged, were then registered in the name of a nominee for OUB known as OUB 2006 Nominees (Tempatan) Sdn Bhd ('OUB Nominees'). A

[5] Subsequently, on 25 April 2000, CCSB was wound up pursuant to a winding up petition by a company known as TR Hamzah & Yeang Sdn Bhd. One Chuah Seong Phaik of Messrs Paul Chuah & Co was appointed liquidator for CCSB. B

[6] On 9 January 2007, Chuah Seong Phaik, as liquidator and in the name of CCSB, entered into an agreement with the appellant/defendant. By this agreement, Chuah, as liquidator of CCSB, sold those parcels of land belonging to CCSB to the defendant. Pursuant to the sale and purchase agreement, the defendant paid RM7.9m to the stakeholders jointly appointed by the liquidator and the defendant. As a follow-up action to this sale transaction, the defendant, as purchaser, lodged caveats on the titles of CCSB's lands. These caveats are registered as: C D

(a) presentation No: 311/2007; and

(b) presentation No: 397/2007. E

[7] On 4 April 2008, the respondent (United Securities Sdn Bhd) filed an originating summons at the High Court of Kuala Lumpur against the appellant (North Plaza Sdn Bhd) applying to remove the caveats. The main reason given by the respondent for making the application is that the appellant did not have a caveatable interest over the parcels of land. F

[8] The respondent succeeded in their originating summons application to have the caveats removed; and, hence, the present appeal by the appellant. G

[9] Now, it pertinent to note that prior to the filing of the originating summons on 4 April 2008, the respondent/plaintiff had been wound up by an order of the High Court of Kuala Lumpur dated 30 January 2007, pursuant to the presentation of a winding up petition by a company called Equiticorp Holdings Ltd. The official receiver was appointed as the liquidator. The respondent appeal to the Court of Appeal against the winding up order, and pending the disposal of the appeal the respondent was granted by the Court of Appeal an interim stay of the winding up order. The respondent's originating summons was filed while the interim stay order was still in force. However, on 6 May 2008 the appeal was dismissed by the Court of Appeal. H I

[10] At this juncture, we pause to make the following remark. We observe that, even after their appeal had been dismissed by the Court of Appeal, the respondent still proceeded with the originating summons proceeding before the High Court and subsequently obtained an order in their favour on 20 August 2008. This is highly irregular. Strictly, after the dismissal of their appeal by the Court of Appeal, the respondent no longer has any locus to proceed with their originating summons since the winding up order is now confirmed and the interim stay order automatically ended. After the dismissal of the appeal, by reason of s 236(2)(a) of the Companies Act, which states:

(2) The liquidator may —

(a) bring or defend any legal action or other legal proceeding in the name and on behalf of the company;

only the liquidator (that is, the official receiver) may proceed with the originating summons in the name of the respondent company; and not the directors of the respondent. However, this issue is not raised before us by the appellant in their memorandum of appeal. Nonetheless we strongly felt that we should bring up this matter in passing during the hearing before us.

[11] And when we raised this issue, learned counsel for the respondent, Mr Rajenthirakumar, explained to the court that the liquidator's solicitors, via their letter dated 3 July 2008, had informed the respondent's solicitors that the liquidator consented to the respondent's director's proceeding with the originating summons subject to the latter agreeing to certain conditions (for example, all costs of the proceedings are to be borne by the respondent and that the respondent is to indemnify the liquidator against any claim from any party arising from the proceeding). We are, however, of the opinion that under the Companies Act, the liquidator has no power to give such consent. It is clear to us, upon reading s 236(2)(a), that it is for the liquidator himself to proceed with the originating summons — if he wishes to proceed. He cannot authorise or delegate that power to anyone else, including the respondent's directors; and in proceeding with the originating summons, he may, if necessary, engage and advocate (see s 236(1)(e) of the Companies Act) to act on his behalf.

APPLICATION FOR REMOVAL OF CAVEATS

[12] One of the issues before us is whether the respondent, in applying to remove the caveats pursuant to s 327 of the NLC, is an 'aggrieved' person or body for the purpose of that section. The provisions of s 327 reads:

327 Removal of caveats by the Court

(1) Any person or body aggrieved by the existence of a private caveat may

at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

(2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.

(3) Every cancellation under sub-section (2) shall be signed and sealed.

[13] The learned High Court judge, in allowing the application for the removal of the caveats, was of the view that the respondent was an aggrieved person (or body) for the purpose of the above provision. To arrive at this conclusion, the learned judge first made a finding that the respondent was the beneficial owner of the shares of CCSB notwithstanding the fact that the shares were registered in the name of OUB Nominees. In his judgment, the learned judge said:

> It is not disputed those shares have been pledged and registered in the name of OUB 2006 Nominees (Tempatan) Sdn Bhd as security for a loan granted by Overseas Union Bank to the plaintiff. The fact the pledge and registration are as security for loan granted to the plaintiff means that the registration in the name of OUB 2006 Nominees (Tempatan) Sdn Bhd or Overseas Union Bank, and that the plaintiff retains the beneficial interest in those shares. The fact that the shares are held by a nominee company lends further weight to the limited purpose nature of their registration in the name of OUB 2006 Nominees (Tempatan) Sdn Bhd.

[14] The learned judge then referred to *Miharja Development Sdn Bhd & Ors v Tan Sri Datuk Loy Mean Heang & Ors and another application* [1995] 1 MLJ 101; [1995] 1 CLJ 523. In this case cited, VC George J (as he then was) said (at p 110 (MLJ); p 529 (CLJ)):

> They had deposited their shares with the lenders as security for the loans. The shares are held by the lender's nominee company who have had the shares registered in their name in their capacity as a nominee company. It has not been suggested that they hold the shares otherwise. As their name suggests they only hold the shares nominally; they hold them on trust for the real shareholders. While a company need not, shall not, look behind the share certificate, that is to say that in fact shares cannot be held in trust by one person on behalf of a beneficiary.

[15] The learned High Court judge in the present case thereafter made the following finding:

> 26 OUB 2006 Nominees (Tempatan) Sdn Bhd thus stands as a trustee for the plaintiff, and in the event the security was availed of, it remains as

trustee for the residual interests of the plaintiff who is at all times the beneficial owner who has complete right of a proprietary nature to share to share in the surplus assets.

[16] The learned judge also made a further finding as follows:

> 27 The court accepts that as the beneficial owner of the shares in City Centre, the plaintiff is a contributory of City Centre in the winding up. The plaintiff has, therefore, a direct interest that the assets of City Centre are disposed of according to the terms of the order of the winding up court, which procedures were to ensure that assets are disposed of at appropriate values to ensure that creditors and contributories will be able to recover what is due to them respectively. As such the plaintiff has a direct interest that procedures approved by the court under the winding up order since the plaintiff may, as a contributory, be exposed if there is shortfall and certainly is beneficially entitled to the balance in the event there is an excess. Indeed the liquidator is an equitable trustee for those entitled to the assets of a company in a winding up, be they creditors or shareholders for all who have an interest in value being obtained for the assets of a wound up company.

[17] Learned counsel for the appellant, on the other hand, submitted before us that the respondent has no legal or equitable interest in several parcels of land and is therefore not aggrieved by the caveats. He pointed out to us the undisputed fact that the respondent is not registered proprietor of the parcels of land. He stressed the fact that the registered proprietor of the parcels of land is CCSB.

[18] Now, as to the meaning of 'aggrieved' for the purpose of s 327(1) of the NLC, the Court of Appeal in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin Raja Hussin* [1997] 2 MLJ 487; [1997] 3 CLJ 854 made the following remark (see at p 499 (MLJ); p 868 (CLJ), the judgment of the court, delivered by Mokhtar Sidin JCA):

> The Code contains no definition on who is an aggrieved person. To my mind, the word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct or another person or body. The category of aggrieved persons is never closed.

[19] With the above broad principle in mind, on the facts of the case before us, particularly, the fact that the respondent is not the registered proprietor of

the parcels of land, nor a bona fide purchaser for value of the same, it is our judgment that the respondent is not aggrieved person for the purpose of s 327(1) of the NLC.

[20] We are, however, prepared to accept that the respondent, being the pledgor of the shares of CCSB, and following *Miharja Development*, has a beneficial interest in those shares. Be that as it may, on the question as to whether or not the respondent is a contributory in relation to CCSB, we, however, wish to refer to the definition of 'contributory' as provided for in s 4(1) of the Companies Act 1965. In this section, the word 'contributory' is given the meaning:

> ... a person liable to contribute to the assets of the company in the event of being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

[21] In *Miharja Development*, VC George J expanded the above statutory meaning of the word 'contributory' to include shareholders who have charged their shares as security for a loan and had shares thereafter registered in the name of a nominee company — the nominee of the lender/pledgee. With respect, by reason of the above definition of 'contributory', we are not prepared to go so far as to hold that the respondent is a contributory in relation to CCSB. In other words, with the respect, we are not in agreement with the views of the learned High Court judge and VC George J on this point.

[22] But the fact remains that the respondent is not the registered owner of the parcels of land in respect of which caveats are lodged. The registered owner, as has been pointed out earlier, is CCSB. It is an elementary principle of company law that a company (and in the context of the present case, it is CCSB) is a legal entity which is independent and separate from its shareholders. It therefore follows that the respondent, having merely a beneficial interest in the shares of CCSB, does not have any proprietary rights (either legal or equitable) over the parcels of land (*Macaura v Northern Assurance Co Ltd* [1925] AC 619; *Abdul Aziz bin Atan & 87 Ors v Ladang Rengo Malay Estate Sdn Bhd* [1985] 2 MLJ 165). Hence, the respondent is not an aggrieved person (or body) in relation to the parcels of land and the caveats for the purpose of s 327(1) of the NLC; and the legal position would still be the same even if the respondent were to be registered shareholders of those shares. In our view, if at all any party is aggrieved by the existence of the caveats, it would be CCSB and not the respondent. Since the respondent is not a aggrieved person, they have no locus standi to make the application under s 327(1) of the NLC.

APPLICATION FOR SECURITY FOR COSTS

[23] Before the learned High Court judge there was an application by the appellant/defendant pursuant to s 351(1) of the Companies Act for security for costs in the sum of RM150,000 (or such amount as the court deemed fit). Section 351 provides:

> Security for costs
>
> 351 (1) Where a company is plaintiff in any action or legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until security is given.

[24] The reasons advanced by the respondent for the application were that:

(a) the respondent/plaintiff had been wound up by the court; and as such there was a high risk that the respondent would not be able to pay costs to the appellant/defendant in the event that the respondent's originating summons were to be dismissed by the court; and

(b) the appellant had good grounds in opposing the respondent's originating summons.

[25] In dismissing the appellant's application for security for costs, the learned High Court judge said:

> 19 The ground relied upon in this case is that the plaintiff company is wound up. It must be borne in mind the ground for a winding up is that it is fair and equitable that the company be wound up. However, it may be fair and equitable to wind up a company for a number of reasons. The common ground is that it is unable to pay its debt as they fall due. It does not mean it does not have sufficient assets and be unable to pay. Therefore, reliance upon the ground that the company has been ordered to wound up, the bills could be submitted to the liquidator. There is also no evidence put before this court to suggest that the debts of the plaintiff and its 100% subsidiary, City Centre, would exceed the market value of the lands in dispute.

[26] With respect, we have a different view. A

[27] To begin with, we propose refer to *Skrine & Co v Mbf Capital Bhd & Anor and other appeals* [1998] 3 MLJ 649; [1998] 3 CLJ 432, where Gopal Sri Ram JCA (as he then was) said (at pp 657–658 (MLJ); p 444 (CLJ)): B

> In order to appreciate the arguments of counsel in support of these appeals, it is necessary to hearken to the statutory provision under which the application were made. It is s 351 of the Companies Act 1965 which reads:
>
> > Where a company is plaintiff in any section or other legal proceeding the court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until security is given. C
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> As may be seen, and this is borne out by the authorities decided upon parallel provisions in other common law jurisdiction, the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. The first step is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant. D E

[28] In the instant case it is common ground that the respondent company has been wound up by the court. In *Northhampton Coal, Iron and Waggon Company v Midland Waggon Company* (1878) 7 Ch D 500, Jessel MR said (at p 503): F

> I should say that the fact of the plaintiff company being in liquidation would be sufficient 'reason to believe' the assets to be insufficient unless evidence to the contrary was given. G

[29] Based on the above principle, and considering that the respondent had been wound up by the court, there is, therefore, reason then to believe that the respondent would be unable to pay the costs of the appellant if the latter were to be successful in their defence — unless evidence to the contrary is given by the respondent. The inquiry then would be: has the respondent given any evidence to the contrary? We must say that we are unable to find any credible evidence to the contrary. H I

[30] Learned counsel for the respondent, nevertheless, submitted that the appellant's contention that there is a high risk that the respondent would not be able to pay costs to the appellant is unjustified. It is unjustified — so argued counsel — because the parcels of land are worth at least RM158m. In

our judgment, there is no merit in this argument, because, firstly, there is no valuation report tendered to confirm that the parcels of land were in fact worth RM158m; and, secondly, in any case, the parcels of land do not belong to the respondent; they belong to CCSB, and as such the parcels of land are not the assets of the respondent.

[31] And by reason of what we have already said in our judgment above, we are satisfied that the appellant has merits in their defence, that is to say, the respondent's prospects of success in their originating summons being extremely slim, if not nil. Indeed, this fact is confirmed by the very fact that we have just allowed the appellant's appeal pertaining to the caveats. It is a principle of law that the respondent's prospect of success is also relevant factor (among factors) in deciding as to whether or not security for costs ought to be ordered against the respondent (see *Drumdurno Pty Ltd v Braham* (1982) 7 ACLR 131; and *KD Resources Sdn Bhd v Ng Boon Jieh & Son Realty Sdn Bhd & Anor* [2003] 1 CLJ 333).

[32] In conclusion, apart from setting aside the order of the High Court pertaining to the originating summons itself, we are also setting aside the order of the learned High Court judge refusing security for costs. Instead, we are making an order that the respondent do deposit as security for costs a sum of RM40,000, such sum to be deposited within three months of this order.

Appeal allowed with costs.

Reported by Kohila Nesan